Supreme Court, U.S.
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In The

Supreme Court of the United States

NATHANIEL GOLDSMITH,

Petitioner,

v.

SWAN REEFER A.S.,

and

DEL MONTE FRESH PRODUCE N.A., INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the shipowner's duty to intervene extend to stopping or ameliorating the danger of an unsafe stevedoring operation where (1) a ship's officer is watching the operation and the situation he observes threatens immediate injury; or (2) the shipowner learned or should have learned that the stevedoring operation itself was unsafe because it was used repeatedly over a 12-year period on the same ship and its dangerous nature was not only obvious to the ship's officers but threatened all who were aboard the vessel, including crew and visitors in addition to longshoremen?

2. Does a duty to "supervise" the stevedoring operation, which appears in a charter party, obligate the shipowner to supervise the stevedoring operation and thereby prevent or ameliorate dangers to longshoremen?

3. Does a terminal operator owe a duty of due care to longshoremen hired to unload cargoes from ships calling at the terminal pursuant to a contract between the terminal operator and the stevedoring contractor?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable because petitioner is an individual.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Nathaniel Goldsmith, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 6, 2006 which affirmed the grant of Summary Judgment to both defendants by the District Court, and, in support thereof, represents as follows:

OPINIONS BELOW

The Third Circuit Court of Appeals Opinion was marked "Not Precedential" but was published at 2006 U.S. App. LEXIS 8577. The District Court's Opinion was marked "Not for Publication" and was not published. The District Court's Opinion is at App. 15 and the Court of Appeals Opinion is at App. 1.

JURISDICTION

The Third Circuit filed its Decision on April 6, 2006 and entered an Order denying a Motion for Redesignation of the Opinion to "Precedential" on May 11, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Third Circuit Court of Appeals decision on a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

33 U.S.C. §905(b)

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report 72-1441 and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at 4698.

STATEMENT OF THE CASE

On May 10, 2002 Petitioner (hereafter "Goldsmith") filed a Complaint seeking damages for personal injuries suffered on February 20, 2001 while he was working as a longshoreman aboard the TUNDRA CONSUMER. Recovery was sought from the shipowner under §905(b) of the LHWCA and under the general maritime law from the terminal operator. Other defendants originally sued were let out by stipulation, and only the shipowner and terminal operator remain. The District Court granted Summary

Judgment in favor of both, and this was affirmed in a non-precedential opinion by the Third Circuit Court of Appeals.

Discovery disclosed the following facts, and many of these, including all of the testimony of the 30(b)(6) designee for the shipowner, were not mentioned by the District Court or the Court of Appeals:

Del Monte's Involvement

The accident occurred at a terminal operated by the respondent Del Monte company (hereafter "Del Monte"), which was responsible for the smooth transition of cargo from the ship to the trucks on the Del Monte pier which then delivered it to supermarkets and the like. Del Monte contracted with Delaware River Stevedores, Inc. (hereafter "DRS") to do the discharging. For several years Del Monte had its own stevedoring company, Southern Stevedores, Inc. (hereafter "Southern Stevedoring"), but 6 or 7 years ago it discontinued its own stevedoring and contracted with DRS.

Unlike other container piers in the Philadelphia vicinity, the Del Monte terminal had no shore-based crane. During the 12 years or so that ships were discharged at the Del Monte terminal, either by Southern Stevedoring or by DRS, the discharging operation was always carried out the same way, and ship's cranes were always used to discharge loaded containers, with 2 longshore gangs working on the ship at the same time.

A different Del Monte company time-chartered the vessels, and it had a captive company which oversaw the itineraries of the vessels. That company scheduled vessels to load fruit in Moin, Costa Rica on Mondays and Tuesdays

and to discharge that fruit in Philadelphia the following Monday, Tuesday and Wednesday. Adherence to that schedule was very important because deviations were costly.

Each Friday there was a meeting of supervisory personnel of Del Monte and DRS in Del Monte's offices in order to make a plan of discharge for the vessel due to arrive two days later. Prior to that meeting Del Monte and DRS would receive a stowage plan which described the cargo that was on the vessel. The Friday meeting dealt with informing DRS of Del Monte's needs so that DRS could plan how to meet those needs within the time allotted for discharge.

The TUNDRA CONSUMER had been arriving in Camden every other week for 12 years or so, so the discharge operation was fairly routine. The plan of discharge, including the number of gangs to be used, had to be approved by Del Monte, and Del Monte would change DRS' plan if it wanted a ship worked in a different way.

Because there was no shore-based crane, the vessel's cranes were used to discharge the loaded containers, and this caused the vessel to list during discharge. The listing of the ship during discharge was a normal occurrence to some degree because the ship was sitting in water. The more containers that were discharged, the more the vessel tended to list because it was lighter. When the vessel was loaded with containers, it tended to remain steadier in the water.

Discharging proceeded as necessary from side to side in order to keep the vessel as level as possible. The longshoremen would not discharge all of the containers from one side because the vessel would list too much. They

alternated to enable themselves to work on as level a platform as possible.

When two gangs were using the ship's cranes to discharge the loaded containers, they tried to alternate the lifts so that only one crane at a time was lifting a loaded container. The purpose of this was also to minimize the listing.

During the actual discharge, Del Monte's Manager, Jenks, was in constant "co-ordination" with DRS about how the discharge was progressing. DRS considered this to be "supervision" of its activities. Jenks frequently watched the stevedoring operation. While doing so, looking for safety hazards was not one of his responsibilities. While Jenks was observing, he would almost always see a list in the ship being discharged, but he never considered the listing of the vessel during discharge to be a dangerous condition. No matter how big the list, Jenks never thought it constituted a danger. The safety of the longshoremen was simply not his concern.

The Accident Facts and The Stevedoring Operation

Goldsmith was a longshoreman for approximately 32, 33 years. He worked at the Del Monte terminal discharging fruit when Southern Stevedores did the stevedoring. His experience was that two gangs were always used to discharge loaded containers, and this he found to be dangerous. When he was working in the hold of the ship, sometimes the ship would "lean all the way over."

The accident happened sometime in the morning. Goldsmith was on the main deck, near the No. 3 hatch, and loaded containers were being discharged. He was

walking between a loaded container to be discharged and the side of the ship, where there was no railing.

In the four corners of each container were locks which kept the containers in place, and the longshoremen called them "pineapples." After a container was discharged, a longshoreman would go on top of the container beneath it and take out the four pineapples from the corners and drop them down onto the deck. Goldsmith, who was standing on the deck, would then go and pick up the pineapples and move them out of the way to prevent anyone from tripping on them. Another longshoreman, Louis Seals, was doing the same job in the same way. While Goldsmith was picking up the pineapples, the container which ultimately struck him was sitting motionless on the deck. The crane operator could not see Goldsmith and Seals because the container blocked his view.

As Goldsmith was picking up a pineapple someone yelled, "Out of the way." Goldsmith ran, but a container swung and hit him and knocked him over the side of the ship. Seals also ran, but in a different direction, and he was not injured. Goldsmith fell 20 feet onto the pier and then bounced off the pier and into the water.

The Stevedoring Ship Boss, William Collins, was 50 feet away, on the pier, and he was an eyewitness to the accident. Two gangs were then discharging the loaded containers, and each gang was using a ship's crane, which was typical. Collins was supervising both. One gang was in the forward end of the vessel, and one gang was using the after crane, at No. 3 hatch. Collins saw the forward crane lift a loaded container weighing about 20 tons and place it on a truck chassis on the pier. This caused the ship

to list "normally." The container was released, and the crane in after end (at Hatch No. 3) began to discharge a loaded container. The forward container was not seated properly on the truck chassis, so the crane operator grabbed it and lifted it again, and this pulled the ship down severely. The sudden, severe listing of the ship caused the after container to sweep Goldsmith off the ship.

Collins' account was corroborated by two other eyewitnesses, Hatch Bosses Lamb and Saravello, who were also on the pier. The crane operator, who could not see Goldsmith and Seals, thought that he may have caused the accident because he lifted the container from the deck just before it swept Goldsmith off the ship.

It was not unusual for a crane operator to put a container on a truck chassis on the pier and then instinctively lift it back up when he saw that it wasn't seated properly on the chassis. This happened just about every day, or at least it was a fairly common occurrence. Having two crane operators lift loaded containers at the same time was something the longshoremen tried to prevent, but the undisputed testimony was that they could not always prevent it and it occurred despite their best efforts at prevention.

DRS was clearly responsible for all operational details. As Ship Boss, Collins was the one responsible to coordinate the two crane operators so that only one was discharging a loaded container at a time. Collins and all of the Hatch Bosses testified that they always tried to have the gangs alternate the discharging, but they were not always successful.

To improve communication DRS tried using radios and three-way walkie-talkies, but neither worked satisfactorily. What happened to cause the accident, i.e. two cranes lifting loaded containers at the same time, "happens sometimes but not a lot." Collins affirmatively testified that there was nothing he could do to prevent the accident. Other hatch bosses agreed that it was impossible to prevent two cranes from lifting 2 loaded containers at the same time all the time. One said that crane operators get preoccupied with their work and another said that things "just happen." All four hatch bosses agreed that the operation was inherently dangerous because the ship was sitting in water and ship's cranes were used to lift very heavy weights.

All agreed that using a shore-based crane was safer. A mobile shore-based crane was used only when a ship's crane was malfunctioning, and all agreed that the listing during discharge was reduced. All agreed that using a single gang rather than two was safer because it eliminated the risk, and one thought having another signalman might be helpful. The use of two gangs was the way it had always been done, including the several years when Del Monte did its own stevedoring.

Over the years the ship's Chief Mates would routinely ask the Stevedoring Ship Boss to try to minimize the listing, but otherwise they would do nothing. The ship's officers were "always hollering about the ship listing too much. It's nothing we can do about it. They holler about it. Stuff in the cabinets roll over. It's life aboard a ship." That was Ship Boss Collins' testimony.

Complaints about the procedure being dangerous were not made to Del Monte because DRS longshoremen tried

to do the best they could without chasing the work elsewhere. Goldsmith's Hatch Boss said simply that that's the way Del Monte wanted the work done.

The Involvement of the Shipowner

The shipowner's Answers to Interrogatories repeated the following several times: "The Chief Officer was watching the discharge at the time and witnessed the accident." No other information was obtained because the shipowner failed to produce either the Chief Mate or any other officer from the vessel. Upon Motion, the District Court ordered that no officer could be produced as a witness at trial if not produced for deposition by December 31, 2004. No one was produced.

The shipowner did produce a 30(b)(6) designee, who testified by telephone from Scotland. He said that if the Chief Mate was watching the operation and saw a longshoreman between the ship's edge and a container to be discharged, he should consider that person to be in immediate danger and should tell the stevedoring supervisory personnel about it as quickly as possible to prevent the longshoreman from being knocked overboard. The ship's railing was down during the discharge, as was customary, and the 30(b)(6) designee agreed that no longshoreman should be in the area between a container to be discharged and the side of the ship while cargo operations were ongoing because that was extremely dangerous.

As to the listing of the vessel, the 30(b)(6) designee said that during discharge the vessel could be expected to list by a "few" degrees but if the vessel listed to a "significant" degree, that would be "dangerous." He also testified that if the TUNDRA CONSUMER came into Philadelphia

periodically from 1996 or 1997 up until the time of the accident and if during that time the discharge operation caused the vessel to list significantly, the managing company, which operated the ship and employed the crew, would expect the Captain and officers of the TUNDRA CONSUMER to take measures to prevent the list from happening. He also testified that that would have been prudent seamanship in any event.

The managing company had a Health and Safety Manual which the officers were expected to follow. The provisions of that Manual which applied to "working cargo" applied to "anyone" working cargo, including longshoremen.

The Manual charged the Master with the responsibility for controlling the overall safety performance of the vessel and for "ensuring" that the ship's working operations were conducted in such a way that would avoid injury to personnel and damage to owners' and charterer's property. The 30(b)(6) designee was firm in stating that the Manual required the Master to stop something that he considered dangerous. Finally, the designee referred to the Manual's statement that the Master was responsible to ensure the safety, health and welfare of the crew and supervisory personnel aboard the vessel. If the Master saw any operations that he thought might endanger the crew, he was under an obligation to stop them immediately. As mentioned earlier, the 30(b)(6) designee said a discharging operations which caused the vessel to list "significantly" was dangerous and should have been prevented by the Captain and officers.

A c.v. and report from a Master Mariner (retired) who is an Assistant Professor of Marine Transportation at the

Merchant Marine Academy at Kings Point were submitted. Captain Hagedorn's Affidavit said that his c.v. and report were based on first hand knowledge and were true and correct. It further stated that if called to testify under oath, that would be the essence of his testimony.

Captain Hagedorn's opinion was that prudent seamanship to prevent a dangerous working platform as described in both the Health and Safety Manual and in the Time Charter was "not adhered to." In summary, he said that "The use of two gangs using ship's cranes to discharge loaded containers is a very dangerous operation, one the Master should not have permitted or which he should have closely supervised."

All 4 Hatch Foremen who were deposed also testified that using two gangs to discharge loaded containers with the ship's cranes was dangerous or "high risk." All said that despite their best efforts to alternate the gangs, it was impossible to prevent what occurred, for one reason or another. The testimony was also that the operation was performed the same way during the 12 years or so that ships came to the Del Monte pier because that's the way Del Monte wanted it done. Complaints were not made for fear of losing their jobs or having Del Monte take the work elsewhere.

The TUNDRA CONSUMER was under two charters on the accident date.

The Time Charter between Seran Reefer and Lauritzen had a Rider attached to it with individually typed clauses from Cl. 26 to Cl. 86.

Cl. 67 "Attendance" reads as follows:

> Owners to provide at their expenses one Officer and required crew on deck during whole time of loading/discharging to prevent any pilferage or misconduct to the cargo and also watch and secure proper handling and/or stowing of the cargo.

The Subcharter between Lauritzen and Del Monte had a Rider attached to it with individually typed clauses from Cl. 26 to Cl. 79.

Cl. 59 "Attendance" reads as follows:

> Owners to provide at their expenses one crew watchman per hold, and one Officer on deck during whole time of loading/discharging to prevent any pilferage or misconduct to the cargo and also watch, supervise and secure proper handling and/or stowing of the cargo.

The shipowner's 30(b)(6) designee testified that it was the Master's duty to see to it that the owner's responsibilities under the charter between Lauritzen and Del Monte were complied with. This was consistent with the Master's obligation, pursuant to the Health and Safety Manual, to see to it that the ship's working operations were conducted in a way that would prevent injury to personnel and damage to property. If the Master saw something that was dangerous, he was obligated to stop it. This also applied to ensure the safety, health and welfare of the crew. The Health and Safety Manual also required the Master, Chief Mate and other officers to eliminate unsafe working practices and conditions.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. This Court should resolve the conflicts among the Circuit Courts of Appeal concerning the extent of the shipowner's duty to intervene.

The shipowner's duty to intervene was established by this Court in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Among the lower courts the law concerning the shipowner's duty to intervene is in considerable disarray, and the circuit courts are clearly in conflict.

The Second Circuit considers that if "the shipowner knows of the dangerous condition and should anticipate that, even if the condition is obvious, the stevedore will not or cannot correct it and the longshoremen will not or cannot avoid it . . . the shipowner has a duty to take reasonable steps to eliminate or correct the condition." *Cartelli v. Egyptian Navigation Co., Inc.*, 661 F. Supp. 104, 105 (S.D.N.Y. 1986) aff'd. 819 F.2d 1129 (2nd Cir. 1987); *Tragni v. Establissement Maritime Camille,* 705 F.2d 92 (2d Cir. 1983). That sounds remarkably similar to the Second Circuit principle which this Court said it was not prepared to accept in *Scindia*. *Scindia* was cited in both *Cartelli* and *Tragni*, but there was no suggestion that the Second Circuit rule had been altered in any way.

The Fourth Circuit holds a shipowner liable "if it fails to intervene to protect longshoremen from hazards under the active control of the vessel during stevedoring operations." *Hodges v. Evisea Maritime Co.*, 801 F.2d 678, 683 (4th Cir. 1986). This sounds like the active operations duty, but it is characterized as the duty to intervene.

The Fifth Circuit recognizes a general principle that "*Scindia* requires a vessel owner to intervene if the vessel owner has actual knowledge both of the hazard and that the contractor, in the exercise of 'obviously improvident' judgment under 'pertinent statutes, regulations, or custom,' means to continue working in the face of it." It has enunciated several "implementing principles" and has a 6 factor test to guide the determination of whether a shipowner has a duty to intervene. *Fontenot v. United States*, 89 F.3d 205, 209 (5th Cir. 1996); *Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d 26 (5th Cir. 1996); *Williams v. M/V SONORA*, 985 F.2d 808 (5th Cir. 1993); *Marcell v. Sea-Land Service, Inc.*, 883 F.2d 20 (5th Cir. 1989); *Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir. 1985); *Futo v. Lykes Bros. S.S. Co., Inc.*, 742 F.2d 209 (5th Cir. 1984); *Wild v. Lykes Bros. S.S. Co., Inc.*, 734 F.2d 1124 (5th Cir. 1984) and *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983). Although the principle seems broad, its application by the Fifth Circuit almost invariably results in a judgment in favor of the shipowner.

The Ninth Circuit limits the duty to intervene to conditions involving defective ship's gear, which is a literal application of *Scindia*. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1542, 1543 (9th Cir. 1991); *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Bueno v. United States*, 687 F.2d 318 (9th Cir. 1983).

The Eleventh Circuit generally follows the Fifth Circuit and applies the 6-factor test originally established in *Casaceli*. *Roach v. M/V AQUA GRACE*, 857 F.2d 1575 (11th Cir. 1988).

Under the foregoing, a dangerous condition involving stevedoring operations – failure to provide adequate

lighting to illuminate the stow which was close to a ship's ladder – could support liability in the Second Circuit (*Tragni, supra.*) and Fourth Circuit (*Hodges, supra.*) but probably not in the Fifth and certainly not in the Ninth. Dangers involving other than ship's gear could support liability in the Fifth and Eleventh Circuits but not in the Ninth.

The cases are split on whether it is necessary for the shipowner to retain some degree of "control" and only the 6 factor test in the Fifth Circuit (*Casaceli, supra.*) refers in any way to any continuing responsibility on the part of the shipowner to take any steps pertaining to whatever created the danger. In *Tragni*, however, the Court referred to testimony concerning a "custom and practice" which required the shipowner to furnish needed lighting.

The opinion of the court below is at odds with all of the other circuits because it stands for nothing. For some reason the Court of Appeals either could not or would not face the issue and decide it. Instead, it mischaracterized Petitioner's contention as calling for a duty on the shipowner to supervise.

Since the Amendments were passed in 1972 this Court has decided only two cases, and the last was 15 years ago. Petitioner certainly understands this Court's wishes to place the cost on the party best situated to take preventive measures, and in the vast majority of cases that is the stevedore. However, there is a residuum, and Petitioner suggests that the definition of the shipowner's residual duties should give due regard to at least two factors: (1) shipowners also need inducements to encourage safety on their vessels, and this is especially true where foreign vessels with less than well-motivated and trained crews

trade in United States waters and (2) a fair regard for protection of human safety and welfare.

Petitioner requests the opportunity of full briefing and argument so this Court can consider a further refinement of the "obviously improvident" conduct and attitude of the stevedore; whether the obvious danger is ongoing or transitory; whether the danger must be inherent in the operation or extraordinary; whether the duty is limited to malfunctioning ship's gear and whether something other than "custom, law or regulation" should impel the shipowner to act.

This case presents two scenarios: (1) actual knowledge of a temporary, transitory but very dangerous condition and (2) actual or constructive knowledge of a dangerous operation which the stevedore was compelled to use and did use, on the same vessel, over a 12-year period. It also involves clear testimony that the ship's own internal procedures and requirements compelled action which was not taken, and none of this was mentioned by the court below.

2. This Court should decide whether a charter party provision which obligates the shipowner to "supervise" the stevedoring operation requires the shipowner to do so to prevent harm to longshoremen.

The 30(b)(6) designee of the shipowner first read Clause 59 in the Subcharter, which included the duty to "supervise", and then testified that it was the Master's obligation to make certain that that was done. The testimony from the stevedoring personnel was clear that no

one from the ship participated in any way in the stevedore's operations at any time.

The Court of Appeals relied upon *Carpenter v. Universal Star Shipping S.A.*, 924 F.2d 1539 (9th Cir. 1992) to hold that charter party provisions cannot alter a shipowner's obligation. The charter party provision in *Carpenter* was boilerplate and appears in virtually all charter parties, so the *Carpenter* case was correctly decided because a contrary result would have undermined the essential holding of *Scindia*. Petitioner does not seek to do that.

The subcharter before the Court is clear and unmistakable in its application. The Head Charter between Swan Reefer and Lauritzen contained much of the same language but did not include a duty to supervise. The subcharter between Lauritzen and Del Monte added the word "supervise," so it must have been a matter of some importance to the charterer, who must have been willing to pay to have the shipowner do it. The 30(b)(6) designee clearly acknowledged that the Master should have become familiar with all of the terms of the charter and should have seen to it that the supervision obligation was carried out.

The Court of Appeals said there was no evidence of an "intention" that the longshoremen be third party beneficiaries of the undertaking. This Court has held that the relationship between the parties is enough, without the need for evidence of intention, to enable another party to benefit therefrom. For example, in *Crumady v. J.H. Fisser*, 358 U.S. 423 (1959) this Court extended the *Ryan* warranty to a shipowner who was not a party to the stevedoring contract.

In *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 420 (1969) fn. 20 this Court suggested that a stevedoring company could be a third party beneficiary of a charter party provision. The lower court opinion which this Court cited with approval for that proposition was *Drago v. A/S Inger*, 305 F.2d 139 (2nd Cir. 1962), which assumed without deciding that a stevedoring contractor could be a third party beneficiary of an undertaking in a charter party. In *Federal Marine Terminals* there was no suggestion that the "intention" of the parties was even relevant; the relationship between the parties and the nature of the undertaking were enough.

There is a line of cases from the Fifth Circuit which holds Time Charterers liable if they perform their obligations under a Time Charter negligently. The opinions turn on the degree of control which a Time Charterer can exercise, and the opinions are all silent on whether the injured persons were within a class sought to be benefitted or protected by the Time Charter because clearly they were not.

The development of the law and an analysis of each of these cases is found in *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996). The cases discussed are *M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980); *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982); *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416 (5th Cir. 1986); *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376 (5th Cir. 1987); *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987); *Moore v. Phillips Petroleum Co.*, 912 F.2d 789 (5th Cir. 1990) *Forrester v. Ocean Marine Indemnity*

Co., 11 F.3d 1213 (5th Cir. 1993); and *Randell v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994).

The rationale of these cases is that of putting the cost on the party best situated to take preventive measures although that precise wording is not used.

The contractual obligation assumed by the shipowner in this case has nothing whatsoever to do with the 1972 Amendments and the duties thereunder. It was an undertaking assumed approximately 30 years after the amendments were enacted, and it applied to a ship regularly trading in U.S. waters. The word "supervise" was selected by the time charterer, a Del Monte company familiar with the terminal facilities in Camden. This obligation mirrored the Master's duties in the managing company's Health and Safety Manual and reflected seagoing custom and practice as expressed by Petitioner's expert.

The lower court cases which suggest that only stevedoring contracts were contemplated by this Court in the *Scindia* exception involving "contract provision, positive law or custom" make no sense. The stevedoring contract to which this Court referred in fn. 23 in *Scindia* might have been relevant to the question of the shipowner's obligation to repair the malfunctioning winch. It makes no sense whatsoever to think that a shipowner would insist on the right to supervise the operations of a contractor doing work about which the crew knows virtually nothing. The lower courts clearly need this Court's guidance concerning the application of charter party provisions.

3. This Court should define the duties of a terminal operator.

Two tests must be satisfied for maritime jurisdiction to apply: (1) the locality test; and (2) the connection with maritime activity test. The foregoing was first established in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and has been reaffirmed in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990) and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). A wrong committed on land with its impact on navigable waters constitutes a maritime tort. *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973) cert. den. sub nom. *Chicot Land Co. v. Kelly*, 416 U.S. 969 (1974).

Since the accident happened on a vessel which was in navigable waters and occurred while plaintiff was in the course of maritime employment, both tests are satisfied and the maritime jurisdiction attaches even though the wrongful conduct may have been committed on land.

The most widely cited statement of the standard of care to be applied in general maritime law cases is in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), and it simply imposes "the duty of exercising reasonable care under the circumstances of each case." This Court approved this formulation in *Federal Marine Terminals, Inc. v. Burnside*, 394 U.S. 404, 415 (1969), but it did not further define the contours of the duty. The general principle was reaffirmed in *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), where this Court also observed that "the rule will undergo refinement as it is applied to various categories of cases."

Negligence under the general maritime law is discussed at length in Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW (3d Ed. West 2001) at §§5-2 et seq. Dean Schoenbaum points out that a duty of care exists when injury is foreseeable or when contractual or other relations of the parties impose it.

Foreseeability simply requires a showing of a general hazard, not a specific event. *Serbin v. Bora Corp., Ltd.*, 96 F.3d 66, 72 (3d Cir. 1996). That foreseeability was enough to impose a duty of due care on Del Monte in very similar circumstances was found by a District Court in *Mullen v. Alicante Carrier Shipping Corp.*, 2004 U.S. Dist. LEXIS 20055 (E.D. Pa. 2004).

Severe, unexpected listing of the vessel, enough to cause things to fall out of drawers and off shelves and which occurred with some frequency, created a general danger to longshoremen and everyone else who was aboard the vessel. Being swept off the vessel by a container caused to swing by a sudden list is clearly within the general hazard caused by listing.

The use of the ship's cranes was required because Del Monte had no shore-based crane. The testimony from the Hatch Bosses was uncontradicted, and they all said the operation was dangerous and the severe listing could not always be prevented although they did their best to do so.

Both lower courts found no duty due to a lack of complaints. Both courts ignored the testimony that the job was done the same way when Del Monte's stevedoring company did it; that the men understood that Del Monte wanted the job done that way and that no complaints were made because they were afraid of losing their jobs by having Del Monte take the work elsewhere.

Since this Court has not yet defined a terminal operator's duties to longshoremen working on ships docked as its terminal, this Court should do so in this case.

CONCLUSION

The leitmotif of this Court's jurisprudence in this area is that the cost should be placed on the party best situated to take preventive measures. Just the opposite has occurred so far in this case. The operation which created the danger was caused by Del Monte's lack of a shore-based crane, yet Del Monte escapes all liability. The shipowner is also exonerated, yet prudent seamanship and its own internal procedures should have compelled the Master to exercise greater control over an activity taking place on his vessel which endangered everyone aboard. The faults of these defendants could be apportioned pursuant to *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). The party least able to take preventive action was the stevedore because it was forced to work under conditions imposed by Del Monte, and the best efforts of its employees could not prevent the sudden, unexpected listing which caused the accident. Under the analysis of the courts below, the stevedore has to bear the entire cost.

For the foregoing reasons Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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2006 WL 887745

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2023

NATHANIEL GOLDSMITH,

Appellant

v.

SWAN REEFER A.S.
and
DEL MONTE FRESH PRODUCE N.A., INC.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 02-cv-02259)
District Judge: Honorable Joseph H. Rodriguez

Argued February 28, 2006

Before: SLOVITER, FUENTES, Circuit Judges,
and BRODY,* District Judge

(Filed: April 6, 2006)

OPINION

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* Hon. Anita B. Brody, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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BRODY, *District Judge*.

The plaintiff-appellant, Nathaniel Goldsmith ("Goldsmith"), appeals from the order and judgment of the United States District Court for the District of New Jersey granting summary judgment in favor of defendant-appellees Swan Reefer A.S. ("Swan Reefer"), the owner/operator of the ship at issue, and Del Monte Fresh Produce N.A., Inc. ("Del Monte"), the terminal operator. The District Court held that Goldsmith had failed to create any genuine issue of material fact to support a negligence claim against Swan Reefer under the Longshore and Harbor Workers Compensation Act ("LHWCA"), or a general maritime negligence claim against Del Monte. App. 51a. For the reasons that follow, we affirm.

I.

Background[1]

In 2001, the terminal operator Del Monte had a contract with Swan Reefer, the owner/operator of the container ship Tundra Consumer, to transport cargo loads of fruit to the Del Monte dock in Camden. Del Monte hired Delaware River Stevedores ("DRS"), to unload cargo from ships docked at the terminal in the Port of Camden, New Jersey. DRS is a company in the business of removing metal containers of cargo from ships and placing them on trucks at the terminal on shore. Goldsmith was a longshoreman employed by DRS. DRS had no contractual relationship with Swan Reefer.

On February 20, 2001, DRS was unloading containers from the Tundra Consumer using two of the ship's cranes. App. 186a. Goldsmith was picking up discarded corner locks, used to bolt containers to each other and to the deck, that were lying on the deck. While a DRS crane operator was moving a container from its position on deck, the container swung and hit Goldsmith. Goldsmith was knocked over the side of the ship, fell onto the pier and bounced into the water. App. 73a, 208a. DRS Ship Boss William Collins ("Collins") testified that the accident had been caused by a sudden severe list of the ship due to simultaneous discharge of containers. App. 273-75a.

Before Goldsmith's accident, the parties had never heard of an accident being caused by listing, even though DRS had been discharging container ships using two

[1] The facts are stated in the light most favorable to Goldsmith, as the non-moving party in the motions for summary judgment granted below.

cranes for many years. DRS used hand signals to coordinate the operation of the two cranes to minimize listing. App. 156-157a. According to Collins, crew members from the Tundra Consumer were "always hollering about the ship listing too much" because items would turn over in the cabinets. App. 283a. Collins asserted that there was nothing DRS could do about it. *Id.*

Swan Reefer was operating under a time charter agreement with Del Monte on the date of the accident.[2] App. 335a. Clause 59 of the agreement, entitled "Attendance," states:

> Owners to provide at their expenses one crew watchman per hold, and one Officer on deck during whole time of loading/discharging to prevent any pilferage or misconduct to the cargo and also watch, supervise and secure proper handling and/or stowing of the cargo. App. 336a.

The ship's Chief Officer was in fact watching the discharge operation at the time of the accident. App. 435-36a. DRS was not a party to the time charter.

Every Friday, Del Monte's warehouse supervisor met with DRS's managers and foremen to discuss the discharge

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[2] The time charter was a contract between Del Monte and Lauritzen Reefers A/S ("Lauritzen"). The District Court stated that both Swan Reefer and Lauritzen owned, operated, managed and possessed the Tundra Consumer. App. 16a. Lauritzen was dismissed from the case without prejudice prior to the grant of summary judgment to Swan Reefer. On the date of the accident, the Tundra Consumer was actually under two charters: a head charter between Lauritzen and Del Monte, which contained Clause 59 (at issue here), and a sub-charter between Del Monte and Swan Reefer. Swan Reefer does not dispute that Lauritzen's obligations under the head charter apply to its sub-charter with Del Monte.

plan for the next week's cargo. App. 302-307. Del Monte told DRS to discharge the ships within a set time frame. App. 250a. The DRS Ship Foreman testified that the method and manner of unloading containers from the vessel is the responsibility of DRS, and that it would have been his responsibility to prevent abnormal listing through hand signals. App. 156-157a. Del Monte's terminal operator testified that he never thought of listing as dangerous because the discharging ships always listed. App. 19a. There is no evidence that any DRS employees had ever complained to Del Monte about any safety concerns related to the use of two cranes to discharge cargo.

II.

Goldsmith's Claim Against Swan Reefer

We have jurisdiction over this appeal under 28 U.S.C. § 1291. We review the District Court's grant of summary judgment *de novo,* viewing the factual record in the light most favorable to the non-moving party. *MBIA Ins. Corp. v. Royal Indem. Co.,* 426 F.3d 204, 209 (3d Cir. 2005).

Goldsmith brought suit against Swan Reefer for negligence und § 905 of the LHWCA. The LHWCA allows an injured longshoreman to bring an action against the owner of the vessel if his injury was "caused by the negligence of a vessel." 33 U.S.C. § 905(b). Prior to 1972, when the LHWCA was amended to add § 905(b), a longshoreman injured while unloading a ship could recover against the shipowner if the injury was caused by the ship's unseaworthiness or negligence. *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 164 (1981), *citing Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

Before the 1972 amendments, if any unsafe condition existed on the vessel, the longshoreman could recover against the shipowner, "even though the condition was caused, created, or brought into play by the stevedore or its employees." *Scindia,* 451 U.S. at 165.

The 1972 amendments to the LHWCA abolished the longshoreman's right to recover against the shipowner for unseaworthiness, while statutorily preserving his or her right to recover for the shipowner's negligence. As the Supreme Court noted in *Scindia,* § 905(b) of the amended LHWCA did not specify what acts or omissions would constitute negligence on the part of the vessel. *Id.* The Court in *Scindia* went on to delineate the duties of care that the vessel owes to a longshoreman performing cargo operations. The vessel has (1) a turnover duty, requiring it to turn over the ship and its contents in safe working condition, and to warn if they are in a dangerous condition; (2) an active participation duty, to exercise due care in protecting longshoremen from hazards in equipment or areas under the active control of the vessel; and (3) a duty to intervene, if the vessel has actual knowledge of a dangerous condition and reason to believe that the stevedore will not remedy it. *Id.* at 167, 175-79. Furthermore, the Court held that "absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Id.* at 172. The Court noted that imposing upon a shipowner a broad duty to supervise the stevedore would contradict the legislative intent of § 905(b), which was to limit the shipowner's liability. *Id.* at 169. Instead, a longshoreman now had to look primarily to

his or her employer for compensation for injury in a workers compensation-type scheme.

First Goldsmith argues that the vessel breached its duty to intervene under § 905(b) as interpreted by *Scindia*.[3] Goldsmith does not allege that Swan Reefer caused or contributed to any dangerous condition occurring during DRS's stevedoring operations. Instead, he claims that Swan Reefer knew or should have known that DRS's practice of unloading with two cranes was dangerous, and should have intervened to stop it.[4] A general duty to intervene in the operational decisions of the stevedore has been rejected in this Circuit. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), this Court noted that:

> *Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform his job properly . . . Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo . . . we agree with the district courts that

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[3] In his brief, Goldsmith points only to the duty to intervene, not alleging that any ship equipment was in a defective or dangerous condition. Thus the reasoning of the recent Third Circuit opinion interpreting the "turnover duty" in *Hill v. Reederi F. Laeisz, et al.*, 435 F.3d 404 (3d Cir. 2006) does not affect the outcome of this case.

[4] Goldsmith submitted a letter from his maritime expert Captain Hagedorn stating that "[t]he use of two gangs using ship's cranes to discharge loaded containers is a very dangerous operation[,] one the Master should not have permitted or which he should have closely supervised." App. 478-80a. Captain Hagedorn's professional opinion has no bearing on the legal duty owed by the vessel toward the stevedore and longshoremen.

> such observation cannot be used to reimpose the general duty to supervise the stevedore.

Id. at 493-94. Goldsmith seeks to impose liability upon the shipowner, Swan Reefer, for breach of a general duty to supervise the stevedore operations. Such a duty is not imposed by § 905(b). Therefore his claim of negligence under the *Scindia* duty to intervene must fail.

Next Goldsmith argues that the time charter between Del Monte and Swan Reefer imposed a contractual obligation on Swan Reefer to supervise the DRS operations. While the Court in *Scindia* did hold that there is no general duty on the part of a vessel owner to supervise stevedoring operations, it also stated that this lack of duty exists only "absent contract provision, positive law, or custom to the contrary." 451 U.S. at 172. *Scindia* does not specifically define the type of contract that could alter the vessel's duty to longshoremen under § 905(b). In this case, however, Swan Reefer is subject to no contractual provision that would impose such a duty.

There is no contract between Swan Reefer and DRS, and no evidence that DRS or its longshoremen were intended to be the beneficiaries of the contract between Swan Reefer and Del Monte. Clause 59 of the time charter between Swan Reefer and Del Monte requires Swan Reefer to have an officer on deck during loading and discharging, to "prevent any pilferage or misconduct to the cargo and also watch, supervise and secure proper handling and/or stowing of the cargo." App. 336a. Goldsmith argues that this contractual obligation of Swan Reefer puts his case within the "contract" exception mentioned in *Scindia*. We agree with the Ninth Circuit and the district courts in the Third Circuit that have addressed this issue

and held that such a contract provision between the stevedoring company and a vessel does not impose a duty on the vessel to safeguard the longshoremen in the performance of their duties.[5]

The Ninth Circuit interpreted the contract language in *Scindia* to mean that "a contract between the time charterer and the shipowner does not affect the duty owed by the shipowner to the longshoremen." *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1545 (9th Cir. 1991). The charter in *Carpenter* gave the owners "responsibility at all times for proper stowage, which must be controlled by the master," and required the "[c]harterers to load, stow, lash, secure, trim and discharge the cargo free of risks and expenses to owners." *Id.* The Ninth Circuit held that the clauses allocate risk between the charterer and the owner, and "do not inure to the benefit of the longshoremen," thereby failing to create a duty to intervene for the longshoremen's safety. *Id.* In the present case, the contract clause at issue also operates to shift responsibility for the cargo from the charterer to the owner, and appears enacted for the benefit of the cargo. Like the contract in *Carpenter,* Clause 59 is not part of a contract with the stevedore, and does not inure to the longshoremen's benefit.

Two district court judges within our Circuit have also held that language identical to Clause 59 did not give rise to a vessel's duty toward longshoremen. *See Mullen v. Alicante Carrier Shipping Corp.*, 2004 U.S. Dist. LEXIS

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[5] As the District Court correctly noted, the Fifth Circuit cases about time charters cited by Goldsmith are not on point and are not relevant to liability of the vessel under the LHWCA and *Scindia*.

15042 (E.D. Pa. Aug. 2, 2004) (J. Kauffman); *Mankus v. Reefer,* 2003 U.S. Dist. LEXIS 10263 (E.D. Pa. May 20, 2003) (J. Yohn).[6] In *Mullen,* the court examined the context of the contract provision exception in *Scindia,* and determined that it only applies if the contract provision involves a duty to discover dangerous conditions related to stevedoring. The District Court in the instant case agreed with the reasoning of these courts that a contract between parties other than the stevedore, and not enacted for its benefit, does not expand the vessel's duty to intervene for the safety of longshoremen. Goldsmith is unable to show that the stevedore was a party to Clause 59 or that it was enacted for his benefit. We decline to find that the time charter in this case imposed any duty on Swan Reefer or Del Monte to ensure that the stevedore used safe unloading procedures, although we refrain from holding that a contract between a port operator and vessel owner could never impose such a duty.

Because there is no evidence in the record that Swan Reefer breached any duty of care to Goldsmith under § 905(b) of the LHWCA, the District Court correctly granted summary judgment in Swan Reefer's favor.

III.

Goldsmith's Claim Against Del Monte

Goldsmith also brought a negligence claim against the terminal operator Del Monte. The District Court was

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[6] The charter provisions discussed in both *Mullen* and *Mankus* were worded identically to Clause 59 in this case, were captioned "Attendance" like the provision in this case, and were found in contracts between the shipowner and Del Monte.

correct in applying federal maritime tort law to this claim, because the accident satisfied the three criteria of *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995): (1) it occurred on navigable water, (2) it bore a "substantial relationship to traditional maritime activity", and (3) it had "a potentially disruptive impact on maritime commerce." *Id.* at 534. The general maritime negligence standard applicable to Goldsmith's claim against Del Monte is "the duty of exercising reasonable care under the circumstances of each case." *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959).[7] Goldsmith is unable to demonstrate that Del Monte breached any duty of care it owed to him under the circumstances of his accident.

Goldsmith argues that by imposing time constraints on unloading operations, and by involving itself in DRS's unloading plans, Del Monte was at least partly responsible for DRS's use of the allegedly dangerous practice of using two shipboard cranes simultaneously. Goldsmith stresses on appeal that Del Monte met weekly with DRS personnel to discuss a plan of discharge, and that DRS was expected to discharge the ship within the time frame set by Del Monte. App. 250a, 253a. Testimony of Del Monte employees suggests that Del Monte had influence on DRS's operational decisions, so that if Del Monte had not wanted DRS to use two gangs, DRS would not have been permitted to do so. App. 259a, 306a. There is unopposed testimony from DRS employees that they had used two ship-based cranes at the Del Monte terminal for years. App. 21-22b, 161a, 368a. Although presumably Del Monte permitted the use of the two cranes, if not encouraged it, there is

[7] Comparative negligence mitigates damages but does not bar recovery. *Pope & Talbot v. Hawn,* 346 U.S. 406, 409 (1953).

no evidence that Del Monte considered the practice to be dangerous, or that anyone had ever complained to Del Monte about the listing to put it on notice of any danger. These facts are not enough to find that Del Monte was negligent for allowing DRS to use two cranes simultaneously when unloading cargo.[8]

Instead, the facts taken in the light most favorable to Goldsmith show that the listing that led to his accident was caused by improper timing of the cranes, something within DRS's control, not Del Monte's.[9] DRS's Ship Foreman Collins testified that the actual method and manner of getting the containers off the vessel is DRS's responsibility, and that if there were abnormal listing, it would have been his responsibility to fix it. App. 156-57a. DRS employees tried through the use of hand signals to avoid having two cranes discharge containers at the same time, thus avoiding severe listing. App. 152a. There is no evidence that Del Monte had any involvement in the timing of the cranes that led to the listing and Goldsmith's injury.

As the District Court noted below, there is no Third Circuit precedent imposing a duty of care on the terminal operator toward third parties such as longshoremen, here employees of the stevedore DRS with no direct relationship to the terminal operator themselves. This case is

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[8] Goldsmith argues that the letter of Captain Hagedorn shows the use of two cranes to be highly dangerous and thus per se negligent. However, the letter of Captain Hagedorn submitted by Goldsmith addresses only what Captain Hagedorn believed to be the responsibility of the vessel and its officers, not any responsibility of Del Monte.

[9] Also, by all accounts the accident happened suddenly while Goldsmith was in a crane operator's blind spot, a situation that would not have been within Del Monte's control because Del Monte did not control the minute-to-minute operations of DRS operations on the ship.

easily distinguishable from the one district court case cited by Goldsmith for support, *Mullen v. Del Monte Fresh Produce N.A., Inc.*, 2004 U.S. Dist. LEXIS 20055 (E.D. Pa. Sept. 29, 2004). In *Mullen,* terminal operator Del Monte was denied summary judgment in a negligence suit brought by a longshoreman because Del Monte had purchased and provided defective slings that allegedly injured the plaintiff. In *Mullen,* Del Monte had also received complaints about the slings. *Id.* at *10. In the case before us, Del Monte did not provide any equipment at fault, and was not on notice of any dangerous condition. The accident occurred on a ship owned and operated by Swan Reefer, using equipment belonging to the vessel, which was in good repair. Del Monte had received no complaints about any danger stemming from any of its acts or practices, including allowing DRS to use two cranes to discharge cargo.

Goldsmith has failed to meet his burden of proving that Del Monte, which was not an expert in stevedoring operations, had a duty to intervene in the use of an apparently widespread practice by an expert stevedore, or that any breach of that duty on the part of Del Monte caused the accident. We decline to state that a port operator never has a duty to intervene in an unsafe practice or to correct an unsafe condition. But under the circumstances, there is no evidence that Del Monte failed to exercise reasonable care.

Because Goldsmith failed to produce evidence showing that Del Monte violated any duty of care it may have owed him under federal maritime law, summary judgment in Del Monte's was proper.

IV.

Conclusion

We will affirm the District Court's grant of summary judgment to Swan Reefer on the grounds that Goldsmith has failed to produce evidence that would support imposing a duty on Swan Reefer's part to intervene for his safety under § 905(b) of the LHWCA. We will also affirm the grant of summary judgment in favor of Del Monte because Goldsmith has failed to create a triable issue that Del Monte breached a duty of care it owed him under federal maritime law.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATHANIEL GOLDSMITH Plaintiff, v. SWAN REEFER A/S; and, LAURITZEN REEFERS A/S; and, DEL MONTE FRESH PRODUCE INTERNATIONAL, INC.; and, DEL MONTE FRESH PRODUCE N.A., INC.; Defendants.	Hon. Joseph H. Rodriguez Civil Action No. 02-2259 **ORDER**

This matter having come before the Court on separate motions of Defendants Swan Reefer A.S. [81] and Del Monte Fresh Produce N.A., Inc.'s [82] for summary judgment, pursuant to Fed. R. Civ. P. 56, and the Court having considered the parties' submissions; and for good cause shown;

IT IS this 3rd day of March, 2005 hereby

ORDERED that summary judgment is **GRANTED** in favor of Defendants Swan Reefer A.S. and Del Monte Fresh Produce N.A., Inc. as to the entirety of Plaintiff's Second Amended Complaint [61].

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATHANIEL GOLDSMITH, Plaintiff, v. SWAN REEFER A/S; and LAURITZEN REEFERS A/S; and, DEL MONTE FRESH PRODUCE INTERNATIONAL, INC.; and, DEL MONTE FRESH PRODUCE N.A., INC. Defendants.	Hon. Joseph H. Rodriguez Civil Action No. 02-2259 **OPINION**

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RODRIGUEZ, Senior District Judge:

This matter comes before the Court on Defendants Del Monte Fresh Produce N.A.. Inc.'s ("Del Monte") and Swan Reefer A/S's ("Swan Reefer") separate motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Nathaniel Goldsmith ("Goldsmith"), a longshoreman employed by Delaware River Stevedores ("DRS"), is suing Swan Reefer (the vessel owner) and Del Monte (the terminal operator) for negligence pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), and/or federal maritime law. For the reasons discussed herein, the Motions for Summary Judgment will be granted as to both Defendants.

I. Factual Background

Nathaniel Goldsmith filed this lawsuit against Defendants for personal injuries allegedly sustained while discharging cargo as a longshoreman aboard the vessel TUNDRA CONSUMER on February 21, 2001. The TUNDRA CONSUMER was owned, operated, managed, and possessed by Defendant Swan Reefer, a corporation incorporated in Norway, and Defendant Lauritzen Reefers A/S ("Lauritzen"), a corporation incorporated in the Kingdom of Denmark. (Amend. Compl ¶ 8.). The vessel was docked at the Del Monte Terminal, Pier 5, in the Port of Camden, New Jersey. (*Id.* ¶ 10.) Defendant Del Monte was the terminal operator at Pier 5, and is a corporation incorporated in the state of Florida with its principle place of business in California. (*Id.*)

Del Monte has a multimillion dollar service contract with DRS to discharge Del Monte produce from vessels

calling at Pier 5.[1] Goldsmith was employed as a longshoreman with DRS on the day of the accident, (*Id.* ¶ 12.) Presently, Goldsmith has pending claims against Swan Reefer and Del Monte.[2]

On February 21, 2001, DRS was discharging containers from the deck of the TUNDRA CONSUMER by the use of two ship board cranes. (Amend. Comp. ¶ 14.) The cranes would attach to containers on the ship, pick them up, and place the containers on trucks that idled on the wharf. (*Id.*) It is Goldsmith's contention that the use of two DRS longshoreman gangs to simultaneously discharge loaded containers was "potentially unsafe," (*Id.* ¶ 18.)[3] It was this practice that allegedly resulted in Goldsmith being knocked overboard by a container that was being transported by one of the cranes. Goldsmith suffered injuries consisting of, *inter alia,* a concussion and various physical and emotional injuries. (*Id.* ¶¶ 14, 16, 18-20.) When the accident occurred, Goldsmith was picking up corner locks (commonly referred to as "pineapples") on the rear of the ship, when a forty-foot, refrigerated container being moved

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[1] On December 9, 2002, Del Monte filed a Third Party Complaint against DRS. On November 25, 2003, Del Monte withdrew without prejudice its third parry claim against DRS.

[2] All claims, cross claims, and third-party claims by all parties against Defendants Lauritzen Reefer A.S. and Del Monte Fresh Produce, International, Inc. were dismissed without prejudice by stipulation of the parties. (*See* Stipulation, August 4, 2004.)

[3] Generally, as the stevedore, DRS has the primary responsibility for unloading the vessel. DRS's labor is broken down into gangs of longshoreman, typically from 12 to 15 in number, and are usually assigned to unload the various holds of the ship. (Del Monte Br. at 3.)

by the No. 3 crane hit Goldsmith, knocked him overboard, and caused his injuries.[4] (Goldmsith Dep. at 33, 43.)

Substantial deposition testimony was submitted in support of the parties briefs. As will be elaborated on further, the Court's focus is on the testimony relating to the discharge process itself; that is, DRS's use of two cranes to simultaneously discharge the containers from the ship and whether this procedure created a foreseeable hazard. If so, did Swan Reefer and/or Del Monte have any role in creating or acquiescing in the hazard, or what, if any, notice of this "potentially unsafe" condition can be imputed on the Defendants.

A. Submitted deposition testimony

The No. 3 crane operator and DRS employee, Henry Wolfinger ("Wolfinger"), testified that he was not aware of Goldsmith's location when the accident occurred. (Wolfinger Dep. at 20.) Wolfinger stated that the position where Goldsmith was located is not one that you would want to be in when a crane is moving containers towards the edge of the vessel down towards the wharf. (*Id.* at 25-26.) When asked why the crane operator did not see him, Goldsmith admits that the container that hit him probably was blocking the crane operator's view. (Goldsmith Dep. at 91) DRS Ship Boss William Collins ("Collins") stated that a crane operator would take it for granted that nobody would position themselves in a position like Goldsmith. (Collins Dep. at 33.) Also, Collins stated there was nothing DRS or Del Monte could have done to prevent Goldsmith's

[4] Corner locks secure the containers to one another, and are also used to secure containers to the ship's deck.

accident. (*Id.* at 41-43.) This testimony is relevant because both Defendants claim that Goldsmith was contributorily negligent in the accident because he placed himself in a blind spot where he and the crane operator could not see one another.

The undisputed facts in a light most favorable to Goldsmith indicate that the use of two cranes to discharge cargo was common, (Casper Dep. at 22.) Del Monte's Port Manager, Ernie Casper ("Casper") expressed no opinion about the danger that the use of two gangs imposed on the longshoreman, but stated that the use of two cranes had been in effect for 10 or 11 years. (*Id.* at 23.) Moreover, the resulting list of the vessel that results during discharge operations was also common. (Jenks Dep. at 14, Seals Dep. at 50.) Keith Jenks ("Jenks") was the Terminal Operations Manager for Del Monte and testified that he did not consider listing to be a dangerous condition because over his eight year career he always saw discharging ships listing. (Jenks Dep. at 16-17.) Jenks testified that he never heard of a longshoreman being knocked overboard, or other accidents, because of listing. Jenks stated that the Tundra vessels had been calling on the Port of Camden since at least 1994. (*Id.* at 33.) Additionally, William Collins ("Collins"), Ship Boss for DRS, testified that listing was normal during discharge, and it was normal on February 21, 2001. (Collins Dep. at 47.) Other DRS employees, such as gang foremen Stephen Mullen ("Mullen") and Roosevelt Nesmith ("Nesmith"), testified that the use of two cranes to discharge, and the resulting list, was a common occurrence during discharge. (*See* Mullen Dep. at 29, Nesmith Dep. at 15.)

The testimony submitted indicates that the two-crane method of discharge was a process that was not complained

about to either Defendant. Goldsmith's co-worker, Louis Seals ("Seals"), who was adjacent to Goldsmith at the time of the accident, testified that he had never complained to anyone, or head anyone else complain, about the discharge procedures. (*See* Seals Dep. at 50.) The record is unclear on whether Del Monte management ever received a complaint about this allegedly unsafe condition.[5] Moreover, DRS's Mullen testified that he never complained, or knew of anyone who did complain about the two-gang system. (Mullen Dep. at 30.) Yet, when asked if he could make such a complaint, Mullen replied "yes."

Similarly, evidence was not submitted that indicates that Swan Reefer was notified of any unsafe condition, however, Collins testified that periodically, the chief mate (vessel's crew) would check on the progress of the discharge. (Collins Dep. at 53.) Saravello testified that he believed that a prior supervisor, Mutt Collins, went to DRS to complain about the two gang discharge method, and he was allegedly threatened. (Saravello Dep. at 21.) Despite Plaintiff's contention that the ship owner had "done nothing in the past twelve years," the papers submitted do not support the assertion that anyone complained to the ship's officers about the list. (Opp. Br. to Swan Reefer at 6.)

The deposition testimony clearly described the relationship between Del Monte and DRS as it relates to the discharging of cargo. Del Monte's Port Manager, Casper testified that customarily Del Monte had an "information

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[5] Remarkably, Plaintiff's deposition excerpt of Del Monte's Port Manager Casper stops at the precise page where the answer to the notice question would have been revealed.

meeting" with DRS in preparation of the arrival of a vessel into the terminal. (Casper Dep. at 17.) Casper stated that Del Monte did not "approve" the unload plan, but that DRS would work out the schedule as to the number of hours so as to determine how many gangs were needed. (*Id.* at 20-21.) Casper, however, stated that DRS's work had to be done within a certain period of time, but "it wasn't unreasonable." (*Id.* at 21-22.) Jenks, from Del Monte, testified that it was not his job to actively supervise the stevedoring operation. (Jenks Dep. at 13.) Jenks also testified about the weekly meetings he had with DRS, and stated that employment of two gangs was "pretty standard with Tundra Ships." (*Id.* at 27.) Casper and Jenks admitted that Del Monte approved the use of two gangs to unload the containers, (Jenks Dep. at 28, Casper Dep. at 22-23.) Jenks indicated that during unloading, DRS would keep him informed of the discharge production. (Jenks Dep. at 38.) Also, DRS Terminal Manager Joseph Piazza ("Piazza") explained that, during the planning meetings between DRS and Del Monte it was determined how many gangs were needed for discharge – typically, two to four gangs. (Piazza Dep. at 24-25.)

Piazza described the internal safety meetings that were held every one to two months by DRS management that would address certain safety procedures and accidents to the employees of DRS. (*Id.*, at 26-27.) Del Monte did not attend these meetings. (*id.* at 27), and Piazza explained that DRS and Del Monte are completely different companies (*id.* at 29). Piazza testified that he felt that DRS's Jenks made the ultimate decision as to the manner of discharge of the vessel, but most of the time, Jenks would agree with the DRS plan. (*Id.* at 30.) Piazza explained that in certain limited situations Del Monte would

change DRS's discharge plan based upon several external factors. (*Id.* at 31-32.) But, Piazza admitted that Del Monte did not give individualized instructions to longshoremen, or tell DRS how to discharge the ship. (*Id.* at 54.) On occasion, Piazza would talk to DRS about using the pierside crane, but usually those occasions were necessary due to a shipboard crane being inoperative. (*Id.* at 73-75.) Piazza testified that Del Monte set the overall discharge schedule. (*Id.* at 76.) Testimony was not proffered that demonstrated that Del Monte or Swan Reefer put any pressure on DRS to discharge the vessel in an unsafe manner on February 21, 2001, or any other day.[6]

Further, the parties' submissions indicate that DRS was responsible for the actual method and manner of the discharge plan. (Collins Dep. at 29, 43.) Collins admits that had there been an abnormal listing problem, on the day of the accident, it would have been his responsibility to rectify the situation. (*Id.* at 48.) Collins testified that himself, and DRS employees, controlled the discharge by way of hand and arm signals between the two cranes. (*Id.* at 63-64.) DRS's Nesmith explained that the danger was having the cranes operate at the same time, and that hand and arm signals were used to prevent the danger. (Nesmith Dep. at 36-37.) DRS gang foreman Mullen testified that listing occurred during discharge and that crane operators can limit the listing by timing their lifts. (Mullen Dep. at 18-19.) Mullen suggested that an additional DRS worker

[6] Plaintiff submits an email sent to TUNDRA CONSUMER on February 15, 2001, which advised the ship's Master that he was "a little" behind schedule and that his current position was "disastrous news to us [Del Monte]." (*See* Albano Feb. 14, 2001 Email, Pl's Exh. 14.) Despite this email, no evidence was submitted that indicate that the discharge on February 21, 2001, was anything but routine.

could have beep employed to better coordinate the two cranes. (*Id.* at 26-27.) Mullen also suggested using a "Koch" crane [land-based crane], or alternatively, using just one gang to discharge. (*Id.*, at 28.) DRS doorway man Robert Saravello ("Saravello") stated that the use of hand and arm signals was how the crane operators knew when to discharge their containers, (Savarello Dep. at 21-22.) Saravello stated that the responsibility for safely discharging the vessel rests with the stevedoring company. (*Id.* at 24.) Saravello also believed that radios, instead of hand signals, would have been helpful for communication, but admits that over his 27 years of experience that hand and arm signals are a "safe way to do it." (*Id.* at 24-26.) Savarello admits that using one gang is safer than two, and that using the shore side crane is also safer. (*Id.* at 26-27.)

Several DRS employees testified that a radio communication system had been tried to improve communication with the crane operators; yet, this idea was abandoned because the radios did not transmit properly. (*See* Collins Dep. 63-64.) No testimony has been offered that demonstrated that Swan Reefer or Del Monte had any control concerning the manner that DRS communicated with their crane operators during discharge operations.

B. The Hagedorn Report

Plaintiff submits the "Professional Opinion" of Captain John H. Hagedorn (Hagedorn's), a master mariner expert, as well as Hagedorn's curriculum vitae and affidavit in Exhibit 15, an attachment to Goldsmith's Opposition Brief. The first sentence of the opinion states that, "I have been asked by Mr. Smith [plaintiff's counsel] to review

deposition and documents and give my professional opinion on the causes leading to Mr. Goldsmith's injury." (*Id.*) Hagedorn reviewed, *inter alia*, the full complement of depositions, Time Charters, and Stowage Plan for the TUNDRA CONSUMER and opined that "the use of two gangs using ship's cranes to discharge loaded containers is a very dangerous operation one the [Ship] Master should not have permitted or which he should have closely supervised." (Hagedorn Rep. at 3.) Further, he states that, "The ship owner–by virtue of the Masters knowledge and experience knew that the severe listing conditions by lifting two containers at the same time caused an unsafe condition and should have prohibited this or closely supervised it." (*Id.*) Hence, Hagedorn concludes that, "The method of discharge on the M/V TUNDRA CONSUMER on February 20, 2001 was very dangerous, using it [the cranes] without close supervision by a ship's deck officer caused the accident and was not prudent seamanship." (*Id.*)

Del Monte argues that the Hagedorn report places the blame and responsibility for the crane operation and resulting list on the Ship Master [vessel owner] alone. (Del Monte Rep. at 3.) Admittedly, the report only makes a passing reference to the "Del Monte Corporation" as it relates to the Time Charter between Lauritzen and Del Monte. (*Id.* at 2.) Thus, aside from the arguable contractual duties owed by Del Monte, the crux of the Hagedorn report proffers only a causal nexus between Swan Reefer and Goldsmith: the report offers no professional opinion on the liability flowing from Del Monte to Goldsmith. Swan Reefer, however, does not address the opinions raised in the Hagedorn Report in its Reply Brief.

However, Del Monte asserts that this report was submitted four (4) months after United States Magistrate

Judge Rosen's deadline for submitting export reports. (*See* Del Monte Reply at 3 n.1.) The Hagedorn report, according to Del Monte, was not presented to Defendants in accordance with the expert report deadline in United States Magistrate Judge Joel Rosen's Final Scheduling Order dated June 10, 2004. The Hagedorn report is dated December 14, 2004, and was not submitted until January 3, 2005, as an attachment to Plaintiff's Opposition Brief; yet, Judge Rosen ordered Plaintiff to serve upon counsel for Defendants all expert reports no later than September 17, 2004. (J. Rosen Order June 10, 2004 at ¶ 2.) Also, Judge Rosen ordered that each expert report should be accompanied by a curriculum vitae. (*Id.*) The Order stated that "no expert testimony shall be admitted at trial with respect to any witness for whom this procedure has not been timely followed." The critical issue, then, is whether this report can be considered in this motion for summary judgement.

According to the clear direction by the Third Circuit in *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986), it is well within the district court's discretion to disallow expert reports, that are untimely submitted in violation of a United States Magistrate Judge's Fed. R. Civ. P. 16 Scheduling Order, in an opposition to a motion for summary judgment. Lest there be any question, the Hagedorn report has all the markings of an expert report, and therefore, cannot be said to be a mere affidavit in support of plaintiff's opposition to defendants' motion for summary judgment.[7]

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[7] The Hagedorn report is labeled a "Professional Opinion," authored by a "master mariner expert" and is accompanied by a curriculum vitae. The Hagedorn report, filed as an accompaniment to Plaintiff's memorandum of law in opposition to Defendants' motion for summary judgment, falls beyond this basic description of a Fed. R. Civ. P. 56(e)

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Justifiably, the discovery rules set forth in Rule 16 do have an impact on what expert reports considered at the summary judgment stage. As explained in *Koplove*:

> To require less is to deprive trial judges of the ability to effectively manage the cases on their overcrowded dockets. As Rule 16 recognizes, scheduling orders are at the heart of case management. If they can be disregarded without a specific showing of good cause, their utility will be severely impaired.

Id; *see also Julian v. Equifax Check Servs.*, 178 F.R.D. 10 (D. Conn. 1998) (reviewing the statutory construction, the purposes of, and the intent of the Supreme Court in adopting Fed. R. Civ. P. 16(b), and thereby holding that the precepts in Rule 56 do not override the deadlines set forth in the scheduling orders issued pursuant to Federal Rule 16(b). Also, the express language of Fed. R. Civ. P. 16(b) allows for the parties to ask the Court to modify the expert report deadline, upon a showing of good cause.[8] The review

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opposing affidavit. Because it was presented as an expert report, rather than an affidavit, the Hagedorn report does run afoul of this Court's Final Scheduling Order and may be stricken on those grounds, *Cf. In re Safeguard Scientifics*, 2004 U.S. Dist. LEXIS 23494 (E.D. Pa. Nov. 17, 2004) (distinguishing between opposing affidavits and supplemental and rebuttal expert reports).

[8] Fed. R. Civ. Pro. 16(b) provides:

> Except in categories of actions exempted by district court rule as inappropriate. the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference . . . enter a scheduling order . . .
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> A schedule shall not be modified except by leave of the judge . . . *upon a showing of good cause*. (Emphasis supplied.)

Id.

of the docket sheet indicates that Plaintiff did not file any motion for leave to file an untimely expert report; therefore, good cause analysis cannot be conducted. It was best stated by one district court that the Rule 16(b) scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). Thus, by not considering the Hagedorn report, the Court's holding is consistent with Koplove, as well as several other decisions holding that Federal Rule 16(b) requires courts to set and enforce deadlines for the filing of summary judgment motions.[9]

Lastly, allowing this report to be considered would be unfair to Defendants. Defendants waited until September 10, 2004, the dispositive motion deadline, to file their respective motions. At this stage in the legislation, the case was two and a half years' old. Presumably, Defendants waited to the deadline to file a motion for summary judgement since they would be able to see the entirety of the case and advise their clients according. Additionally, after Defendants' motions were filed, each Defendant stipulated to two (2) thirty (30) day extensions, at the Plaintiff's bequest, due to alleged staffing and medical problems on the part of Plaintiff. It was during the end of

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[9] *See, e.g., Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988); *Kennedy v. City of Cleveland*, 797 F.2d 297, 301 & n.6 (6th Cir. 1986); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985); *Chiropractic Alliance of New Jersey v. Parisi*, 164 F.R.D. 618, 621-22 (D.N.J. 1996); *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1434 (D. Kan. 1994); *Bradford v. State of Hawaii*, 846 F. Supp. 1411, 1415 (D. Haw. 1994); *Kinberg v. Colorforms*, 1991 WL 285621, at *3-4 (S.D.N.Y. Dec. 31, 1991); *Busse v. Gelco Express Corp.*, 678 F. Supp. 1398, 1402-03 (E.D. Wis. 1988).

this two month interlude that the Hagedorn report was procured. As stated earlier, the Rule 16 order is not unmalleable; here, Plaintiff could have simply moved to modify Magistrate Judge Rosen's expert report deadline.

While there is no suggestion of bad faith by the Plaintiff, submitting the Hagedorn report two and a half months after the original return date, is a tactical decision, and should not overpower the prejudice which would come from allowing the report to be considered. Given these facts, and the Third Circuit's rule in *Koplove,* the Court has sufficient reason not to consider the Hagedorn report in support of Plaintiff's Opposition Brief to Defendants' Motions in Summary Judgment.

Be that as it may, the Court, will nonetheless consider the report only as it relates to Swan Reefer's liability since the report does not expressly suggest any liability on the part of Del Monte. However, even assuming that the report should be considered, it will be determined in Part IV.A, *infra,* that the report does not create a genuine issue of material fact as to Swan Reefer's liability. Consequently, the Hagedorn report does not change the outcome of this litigation.

II. Jurisdiction

Plaintiff has raised a federal cause of action under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). Accordingly, jurisdiction is appropriate under 28 U.S.C. § 1331 (federal question). Also, the parties are diverse and the amount in controversy exceeds $75,000; therefore, jurisdiction is also appropriate under 28 U.S.C. § 1332 (diversity jurisdiction).

III. Standard for Summary Judgment

Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 482 n.1 (3d Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *accord* Fed. R. Civ. P. 56(c). Thus, this Court will enter summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

An issue is "genuine" if supported by evidence such that a reasonable jury could return a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254,

1258 (D.N.J. 1994). Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Andersen,* 477 U.S. at 256-57. "A nonmoving party may not 'rest upon mere allegations, general denials or . . . vague statements. . . .'" *Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs,* 982 F.2d 884, 890 (3d Cir. 1992) (quoting *Quiroga v. Hasbro, Inc.,* 934 F.2d 497, 500 (3d Cir. 1991)).

Indeed,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322.

In deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). Credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992).

IV. Discussion

A. Swan Reefer's Motion for Summary Judgment

1. Controlling Law

For approximately twenty-five years, ship owners were liable under federal common law for injuries suffered by longshoremen during the unloading of cargo. *See Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946). In 1972, however, Congress passed the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950. The LHWCA eliminated the great majority of causes of action against ship owners by precluding injured longshoremen from suing on the basis of a ship's unseaworthiness. *See* 33 U.S.C. § 905(b). Instead, the LHWCA instituted a system of worker's compensation whereby an injured longshoreman would receive compensation and benefits from the federal government but would not be able to sue his employer, the ship's owner, or the owner's agents unless the owner or agent were actually negligent regarding the injured longshoreman. *Id.*[10] The LHWCA did not specify what acts or omissions would constitute negligence on the part of these actors. Nevertheless, the jurisprudence has established several doctrines depending on the actor involved and the injury suffered by the claimant.

The Supreme Court defined the post-LHWCA negligence of ship owners in the landmark case *Scindia Steam Navigation, Ltd. v. De los Santos,* 451 U.S. 156 (1981). In

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[10] Technically, the LHWCA limits negligence actions against employers and "the vessel." *See* 33 U.S.C. § 905(b). The term "vessel" is defined to include the ship's owner and the owner's agents. *See* 33 U.S.C. § 902(21).

Scindia, the Court held that there were three duties of care owed by a ship owner to longshoremen: (1) The "turnover duties," which include (a) the duty to ensure that the ship and its equipment are in reasonably safe condition and (b) the corollary "duty to warn" the stevedoring company if the ship or its equipment poses a latent threat to the longshoremen, *id.* at 166-67; and (2) the "active control duty," which imposes a duty of care on the owner *vis-a-vis* the areas of the ship that remain under the owner's active control during cargo operations, *id.* at 167 (holding that owner owes no duty in areas "within the confines of the cargo operations that are assigned to the stevedore"). And (3), there is a "duty to intervene," which requires the owner to alert the stevedore to any latent dangers of which the owner becomes aware after unloading has begun. *See id.* at 167-68.

2. The Parties' Arguments

As the vessel owner, Swan Reefer argues it cannot be liable for Goldsmith's injury because it owed him no duty based on the nature of the hazard that allegedly caused his injury. Swan Reefer argues that the jurisprudence in this area has clearly distinguished between the duties owed *before* the vessel is turned over to the stevedore for cargo operations and the vessel owner's obligations *after* cargo operations have begun. Additionally, it is argued that the caselaw also distinguishes the hazards related to cargo work and hazards arising from defects in the ship.

Conversely, Plaintiff argues that the ship had actual knowledge of a dangerous listing condition and did not intervene. Plaintiff states that Swan Reefer voluntarily

assumed the duty of supervision (Op. Br. at 9); yet, Plaintiff also argues that the vessel failed to have an officer and crew supervise that discharge operation, and that, resulted in an unsafe condition (*id.* at 7). Concomitantly, Plaintiff, argues that "Clause 59" of the Time Charter, a contract between Swan Reefer and Del Monte, derivatively created a duty from the vessel owner to Goldsmith. (*Id.* at 7.)

At this juncture in the litigation, it is necessary to address all conceivable theories of liability under *Scindia*. Also, it is necessary to determine what duty, if any, was created by the Time Charter.

3. Swan Reefer Did Not Breach Its Turnover Duty/Duty to Warn

The Supreme Court has held that the duty to warn applies only to hidden hazards that a "competent stevedore" would not anticipate "in the competent performance of his work." *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 98-99 (1994). This holding was based upon the purpose of the LHWCA, which was to transfer the primary responsibility of protecting longshoremen from shipowners, who generally do not oversee cargo operations, to stevedores, who are in the best position to prevent injuries to longshoremen. *Id.* at 101. Thus, the Court held that longshoremen generally may not recover damages from shipowners for injuries caused by cargo. *See id.* at 104 ("For the purposes of delineating the scope of a shipowner's turnover duty, then, the cargo stow is separate and distinct from other aspects of the ship.")

The only cognizable argument that Goldsmith could make is that Swan Reefers negligently failed to oversee

the loading of the cargo from hold #3, with the result that such loading may have been executed improperly. This argument, however, is without merit, for the Supreme Court has explicitly held that a ship's owner has no duty to oversee the loading of cargo by stevedores. *See Howlett,* 512 U.S. at 100 (rejecting argument that owner is required to make reasonable inspection of cargo); *see also Scindia,* 451 U.S. at 168 ("We cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation."). In addition, the Third Circuit has held that even if such a duty were to be created (i.e., by contract), it would not be to the benefit of longshoremen who were injured while unloading the improperly-loaded cargo. *Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490, 493 (3d Cir. 1987) ("The shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out the stevedore's failure to perform his job properly.").

Finally, Goldsmith has submitted no evidence to support a conclusion that the accident was caused by a defect in the ship or its equipment.[11]

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[11] Admittedly, there exists caselaw which imposes a duty on a vessel owner when the hazard created was part of the ship's responsibility, or when the ship's crew actually created the hazard. Thus, a ship's failure to properly stow electrical cords, combined with the crew defectively tying the cords such that the cords would not remain bundled, was sufficient to deny the vessel owner's motion for summary judgment as to only the turnover duties. *See Mankus v. Reefer,* 2003 U.S. Dist. LEXIS 10263, at *15 n.7 (E.D. Pa. May 20, 2003); *see also Kirsch,* 971 F.2d at 103.

Here, the Hagedorn report implies that the ship's deck officers did not "maintain the vessel in a safe condition to work cargo" (*See* Hag. Report at 2-3.) The report goes on to describe how the vertical center of

(Continued on following page)

In sum, Goldsmith provides no evidence from which a reasonable jury could determine that Swan Reefer either violated its duty to warn or caused Goldsmith's injuries, and there are no material facts in dispute regarding this claim except for those raised by Goldsmith's bare assertions. It is undisputed that DRS was an expert and competent stevedore, and no evidence has been brought forth which would bring this determination into doubt. In addition, the injury occurred solely at the hands of DRS employees during what appear to be routine discharge operations. Accordingly, the Court will grant Swan Refer's motion for summary judgment regarding the duty to warn.

4. Swan Reefer's Did Not Breach its Active Operations Duty

The Third Circuit has held that in order for the active operations duty to apply, "the vessel must have substantially controlled or been in charge of (i) the area in which the hazard existed, (ii) the instrumentality which caused the injury, or (iii) the specific activities the stevedore undertook." *Davis v. Portline Transportes Maritime Internacional,* 16 F.3d 532, 540 (3d Cir. 1994). If active control is found, ordinary standards of negligence apply. *Id.* at 537.

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gravity is changed during discharge and "two cranes lifting cargo at the same time would double that loss in initial stability. (*Id.* at 3.) Even assuming that Swan Reefer was responsible for the listing, Plaintiff has proffered no evidence indicating that it was the listing, not the container being transported by a crane (unquestionably under DRS's control), which caused Goldsmith to be knocked overboard, Hence, the causation element is lacking.

The undisputed facts of this case show that the vessel was completely turned over to the stevedore for discharge operations; therefore, there is no evidence that suggests that the vessel maintained control of the cranes or the unloading area in question. Plaintiff does not specifically assert that Swan Reefer breached its active operations duty, but merely offers a conclusory statement that Swan Reefer controlled the discharge operation, without first addressing whether the duty was ever triggered. The stevedore, DRS controlled the cranes, directed the movement of the cranes by way of internally established hand and arm signals. In addition, DRS positioned its longshore gangs in locations on the ship and on the wharf to safely and efficiently discharge the cargo. There is no evidence that the ship's crew retained the requisite control, once the unloading of the cargo began, to trigger the active operations duty. There is nothing in this record from which a reasonable factfinder could infer that Swan Reefer played an active role in the unloading of the TUNDRA CONSUMER in Camden, as would be required by *Scindia* and *Davis*. Moreover, the Hagedorn report does not indicate that Swan Reefer "substantially controlled or was in charge" of the deck area or wharf during cargo operations, the two cranes operated by DRS longshoreman, or the control of those two cranes during discharge. Thus, Plaintiff has not provided a scintilla of evidence in support of an active operations claim. Accordingly, Swan Refer's motion for summary judgment will be granted as to Goldsmith's turnover duty claim.

5. Swan Refer Did Not Breach its Duty to Intervene

Swan Reefer argues that the duty to intervene is the only conceivable theory that Goldsmith could bring against the vessel owner because Goldsmith is claiming that the use of two gangs and/or two cranes to discharge cargo created an unsafe condition. As indicated in Part I, *supra,* Plaintiff simultaneously charges the vessel's crew with voluntarily assuming control of the discharge operation; yet, also argues that the vessel owners ignored a dangerous practice and failed to intervene. Like each of the statutory duties addressed above, Plaintiff does not specifically respond to Swan Reefer's duty to intervene argument in its Opposition Brief, nor has Plaintiff specifically alleged breach of this duty in his Complaint.

In *Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490 (3d Cir. 1987), the Third Circuit observed that the parameters of the vessel's duty to intervene in cargo operations were not fully drawn in *Scindia. Id.* at 496. In fact, the only discussion in *Scandia* related to the shipowner's "duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Id.* (citing *Scindia,* 451 U.S. at 175). Based upon its analysis of *Scindia,* the *Derr* court held that it is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear. *Id.* at 496.

Here, Goldsmith, and every DRS employee who gave testimony, admitted that two cranes were regularly used when discharging cargo at the Del Monte Terminal. (Goldsmith Dep. at 79.) Two stevedores specifically testified that

the sudden, unexpected list was caused by the aft crane picking up its container prior to the forward crane fully discharging and securing its container on the chassis on the pier. (Collins Dep. at 37-39; Lamb Dep. at 17-18, 27-28, 53.) Since the ship has no duty to inspect the cargo handling operation or the stowed cargo, *Scindia,* 451 U.S. at 178; *see Taylor v. Moram Agencies,* 739 F.2d 1384, 1386-87 (9th Cir. 1984) ("the scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment – not on the nature of the cargo"), there would ordinarily be no duty to intervene to remedy dangers created by the method by which the stevedores used to unload the cargo. As such, Swan Reefer did not breach its duty to intervene.

The Hagedorn report does not remotely suggest any defective conditions with respect to the ship, its equipment, or its gear. The report, without any direct or circumstantial evidence, blankly alleges that ship was in someway unsafe. The only unsafe condition, was the manner in which two cranes were used to discharge cargo at the same time. (Hag. Rep. at 3.) Despite Hagedorn's conclusion to the contrary, pursuant to the dictates of *Derr*, there exists no duty to intervene without a cognizable defective condition. Under a light most favorable to Goldsmith, there exists no issue of material fact as it relates to the duty to intervene by Swan Reefer to Goldsmith during cargo operations. Thus, the Court will grant summary judgment as to this theory of liability.

6. Swan Reefer's Contractual Duty to Goldsmith

Goldsmith contends that Swan Reefer had a contractual duty to supervise DRS's stevedoring operations. Goldsmith posits that the shipowner's contractual duty to supervise was established by the head charter and sub-charter between the shipowner and the charterers, Lauritzen and Del Monte. Plaintiff cites a contract provision, "Clause 59" that supposedly trigger this duty.[12] Goldsmith's argument, however, is premised on an unsound interpretation of the applicable Supreme Court authority. Furthermore, even if Swan Reefer owed such a duty to Goldsmith, which is highly questionable, Goldsmith has

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[12] The TUNDRA CONSUMER was under two charters on February 21, 2001. There are many different types of charter arrangements; however, under a time charter, the charterer engages for a fixed period of time a vessel, which remains manned and navigated by the vessel owner, to carry cargo where ever the charterer instructs. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law (4th Ed. West 2004) (hereafter "Schoenbaum") at § 11-1. There was a head charter between Lauritzen and Del Monte, and a sub-charter between Del Monte and Swan Reefer (Pl. Cert. ¶ 93.) The Time Charter between Lauritzen and Del Monte in force at the time contained Clause 59. (*Id.* at 94.) Nevertheless, Swan Reefer does not dispute that it is the obligations under the head charter that apply to the sub charter with Del Monte. Generally, the charterer is responsible for the loading and discharge of cargo. *See* Schoenbaum at § 11-5. Here, however, only Clause 59 is at issue, and it states:

> *59. Attendance*
>
> Owners to provide at their expenses one crew watchman per hold, and one Officer on deck during whole time of loading/discharging to prevent any pilferage or misconduct to the cargo and also watch, supervise and secure proper handling and/or stowing of the cargo.

(*See* Pl. Br. at 7.)

failed to present any evidence as to how Swan Reefer's breach of such a duty caused Goldsmith's injuries.

Goldsmith argues that the contract exception set forth in *Scindia* applies to his case. The *Scindia* court stated, in full, "that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision . . . to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Scindia*, 451 U.S. at 172. Regarding the context, as this complete quote makes clear, the "contract provision" exception is only relevant to the shipowner's duty to the stevedore if the contract provision in question involves a duty to discover *dangerous conditions* as related to the *stevedoring operation*. This is confirmed later in the *Scindia* opinion where the Court reiterates that, in reference to the applicable duties that the shipowner owes the stevedore and its employees, "it may also be that the contract between the stevedore and the shipowner will have provisions specifically bearing on the dispute." *Id.* at 176 n.23.

It appears that the Third Circuit has yet to consider the precise issue of whether a contract between the shipowner and charterer may impact the duties that the former owes the stevedore. One of our sister circuits considered this exact language of *Scindia* in a factually similar case and similarly interpreted the Court's rule to apply to contracts between stevedores and shipowners such that "a contract between the time charterer and the shipowner does not affect the duty owed by the shipowner to the longshoremen." *Carpenter v. Universal Star Shipping. S.A.*, 924 F.2d 1539, 1545 (9th Cir. 1991). Thus, the caselaw supports the logical conclusion that a vessel owner

does not owe a contractual duty to the longshoreman plaintiff who was not a party to these charters.

Further support for this construction of the *Scindia* language, upon which Plaintiff relies, is found in the Third Circuit. Like Goldsmith, in *Derr v. Kawasaki Kisen, KK,* the plaintiff was a longshore worker suing the shipowner for injuries he sustained while plaintiff was unloading the ship's cargo. 835 F.2d 490, 491 (3d Cir. 1987). Interpreting the same language of *Scindia* that plaintiff attempts to invoke, the Third Circuit considered whether the crew's custom of observing the discharging of cargo triggered a general duty to supervise the stevedore. The court held that:

> Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo, we agree with the district courts that such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability.

Id. at 494 (citations omitted).

Comparably, the fact that the shipowner is contractually obligated to the charterer to supervise the handling of the latter's cargo to prevent damage or looting, does not reimpose a general supervision duty owed to the stevedoring operation for the purposes of liability for a longshore worker's physical injuries. Although *Derr* involved custom rather than contract, the Supreme Court in *Scindia* did not differentiate between these possible non-statutory sources of duty, so there is no reason to expect that the Third Circuit's interpretation of the Court's exception

would be any different had a contract been involved. Accordingly, the *Scindia* Court's contract exception is logically interpreted to be premised on the Court's envisioning contract provisions between the stevedore and shipowner, provisions that specifically address the dangerousness of conditions that the longshore workers might encounter during their stevedoring operations.

The contract provisions to which Goldsmith refers are not within this envisioned category of contractual provisions that can effect the duties of a shipowner to longshore workers. First, the provisions are from the Time Charter between Lauritzen and Del Monte. Goldsmith is undisputedly not a party to this charter, nor the sub-charter. Moreover, Goldsmith presents no evidence that either party to the charter intended longshore workers to be third party beneficiaries to, and thus benefit from, the charter. Second, the specific provision that Goldsmith cites has no relationship to the conditions on the vessel that are dangerous to the longshore workers. Therefore, the sub-charter between Swan Reefer and the Del Monte did not create a duty to Goldsmith to supervise the discharge of the TUNDRA CONSUMER's cargo. Finally, the Hagedorn report's conclusory statement that the time charters were "not adhered to" (Hag. Rep. at 2) is not supported by any evidence that the parties intended that the charters applied to longshoreman such as Goldsmith.

Goldsmith proffers a line of Fifth Circuit cases that discuss Time Charterer liability. These cases are not on point as to the issue before the Court; more importantly, these cases do not represent the law of the Third Circuit, Not surprisingly, two Eastern District of Pennsylvania courts have recently held that the identical language in "Clause 59" did not create a duty on the ship owner to

longshoreman. *See Mullen v. Alicante Carrier Shipping Corp.*, 2004 U.S. Dist. LEXIS 15042 (E.D. Pa. August 2, 2004); *Mankus v. Reefer,* 2003 U.S. Dist. LEXIS 10263 (E.D. Pa. May 20, 2003). Therefore, Swan Reefer will not be held to a higher duty of care than that established in *Scindia*. As such, the Court will grant summary judgment as to this theory of liability.

B. Del Monte's Motion for Summary Judgment

1. Federal Maritime Law Applies

As a threshold issue, it must be determined whether the LHWCA or federal maritime law applies because the parties' each base their analysis on different law. For a personal injury claim to fall under the purview of federal maritime law rather than state tort law, a plaintiff must be engaged in maritime employment at the time of the injury and the injury must occur on a covered situs. More specifically, federal maritime tort jurisdiction requires that the incident: (1) occur on navigable waters; (2) bear a substantial relationship to traditional maritime activity; and, (3) have a potentially disruptive impact on maritime commerce. *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-34 (1995); *see generally* Schoenbaum at § 3-5.

Goldsmith's claim involves an alleged tort occurring onboard the TUNDRA CONSUMER while longshoremen were unloading cargo from the vessel. Thus, all three *Grubart* criteria are satisfied in this case. The vessel was docked in a slip at the Del Monte Port terminal, thereby occurring on navigable waters. Goldsmith played an indispensable role in the unloading of the ship – work which the Supreme Court has characterized as historically

"the work of the ship's service." *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 96 (1946); *see also Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963) (ruling that maritime law applies to tort claim arising when longshoreman slipped on sand from bags he was unloading in a building on a pier 100 feet from the vessel). Goldsmith's injury was allegedly the result of an improper method of unloading, and admiralty law has traditionally been concerned with the loading and unloading of vessels. *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 221 (3d Cir. 1977) (citations omitted).

Unlike Defendant Swan Reefer (the vessel owner), Del Monte (the terminal operator) is not limited to the duties and liabilities described in *Scindia* and *Howlett*, because it is not considered a "vessel" for purposes of § 905(b) of the LHWCA.[13] As a result, Goldsmith's claims against Del Monte are governed by general negligence standards under maritime law, which impose "the duty of exercising reasonable care under the circumstances of each case." *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959).

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[13] Section 902(21) of the LHWCA defines "vessel" as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member. 33 U.S.C. § 902 (21). Here, the term "vessel's operator" in the statute should not be confused with a terminal operator. *See Mullen v. Alicante Carrier Shipping Corp.*, 2004 U.S. Dist. LEXIS 20055 at *9 (E.D. Pa. Sept. 29, 2004.)

2. The Parties' Arguments

Plaintiff argues that pursuant to the tenants of general maritime law, that Del Monte allegedly retained continuous and ongoing control of the stevedoring operation, and therefore, had a duty, based on the contract between DRS and Del Monte, to prevent the foreseeable danger of listing. Plaintiff also contends that defenses such as assumption of risk and contributory negligence are not recognized under the maritime jurisprudence. Defendant proffers case law and analysis from § 905(b) of the LHWCA, and argues that a terminal operator need not remedy an "open and obvious" condition. In addition, Del Monte asserts that liability, if any, should fall upon DRS, the expert stevedore. As indicted above, Del Monte's reliance on the LHWCA is misplaced because federal maritime law controls.

In support of a general negligence claim, Goldsmith alleges that all of the Hatch Bosses have testified that discharge methods, approved and sanctioned by Del Monte, were dangerous due to listing. (Pl. Op. at 8.) Goldsmith contends that Del Monte was on notice of this dangerous condition and that Del Monte's primary goal was to complete the discharge as soon as possible so that the vessel could keep its schedule. Goldsmith states, without specific citation to their respective depositions, that DRS employees Collins, Lamb, Mullen, Nesmith, and Saravello all testified that the discharge was conducted in a dangerous manner because "that's the way Del Monte wanted it done." (*Id.* at 8.)

Additionally, Goldsmith argues that summary judgment is not appropriate for several reasons. First, Goldsmith argues that the concepts of assumption of risk and

contributory negligence are not applicable under maritime law; therefore, Del Monte's contention that Goldsmith put himself in a blindspot or that the longshoring operation was an "open and obvious" condition is irrelevant, except for assessing Goldsmith's comparative negligence. (Op. Br. at 3-4.) Second, Goldsmith argues that Del Monte is not entitled to have DRS considered an "expert an experienced" stevedore because the language of *Scindia* does not apply. (*Id.*) Goldsmith bases this argument on the assertion that Del Monte retained continuous, ongoing control of the stevedoring operation, and therefore, owed Goldsmith a duty of care. (*Id.* at 4.) Third, a duty to Goldsmith arose based on the contract formed between Del Monte and DRS regarding the stevedoring operation.

3. Contributory or Comparative negligence

Del Monte proffers that Goldsmith admits in his deposition that he placed himself in a blindspot on the deck were he could not be seen behind a raised cargo container. (Goldsmith Dep. at 44-47.) While this suggest that there may be some liability on Goldsmith's part, under federal maritime negligence law such liability does not preclude a finding that Del Monte was also negligent. *See Pope & Talbot v. Hawn*, 346 U.S. 406, 409 (1953) (recognizing that Plaintiffs comparative negligence mitigates damages, but does not bar recovery). Even assuming Goldsmith was negligent, the Court cannot conclude Del Monte was not negligent, though a jury may determine that such negligence was mitigated by Goldsmith. As such, Goldsmith's alleged negligence has no impact on this Court's summary judgment determination as to the liability of the terminal operator.

4. Duty of Care

There is no Third Circuit precedent for imposing a duty of care on the terminal operator toward third parties, such as longshoremen. Stevedores are generally responsible for protecting their employees, the longshoremen, from potential danger. *Scindia,* 451 U.S. at 170. Goldsmith's assertion that all parties, including terminal operators, involved in the loading operation should follow a uniform standard of care is controverted by the case law. *Id.* (shipowner may rely on stevedore to protect longshoremen from hazards and owes no duty to longshoremen to inspect or supervise cargo operations); *Federal Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969) (shipowner's duty to stevedore differs from duty to longshoremen); *Marant v. Farrell Lines, Inc.,* 550 F.2d 142, 144 (3d Cir. 1977) (stevedore, not vessel owner, has primary responsibility for longshoremen's safety); *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co.,* 444 F.2d 727, 730 (3d Cir. 1971) (stevedore's liability for indemnification is not coextensive with shipowner's liability to injured longshoreman); *Dravo Mechling Corp.,* 557 F. Supp. at 1166-67 (shipowner did not share stevedore's duty to supervise cargo loading). Thus, the great weight of caselaw suggest that the stevedore's duty to longshoreman is generally not imputed on third parties.

Under maritime negligence law, Del Monte had a duty to warn Goldsmith only of dangers that were reasonably foreseeable. *Daigle v. Point Landing, Inc.,* 616 F.2d 825, 827 (5th Cir. 1980). In *Daigle,* it was determined that a towboat master's ability to see the actions of plaintiff did not establish a duty to warn plaintiff. Moreover, the testimony indicated that neither the claimant or anyone else informed the vessel owner that the claimant was

operating a defective winch. Nor did anyone, including the claimant, instruct the master or crew to cease maneuvering the vessel while the claimant manipulated the winch, which caused the claimant's injury. (*Id.*) Likewise, in *Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir. 1985), it was determined that a ship owner had no duty to warn a diver of obvious conditions (debris in the water) which it had no reason to know were dangerous. *Id.* at 1331. Consequently, the fact that the terminal operator observed the discharge operation, does not, in and of itself create a duty flowing from Del Monte to Goldsmith.

In contrast stands the recent case of *Mullen v. Del Monte Fresh Produce N.A., Inc.*, 2004 U.S. Dist. LEXIS 20055 (E.D. Pa. September 29, 2004) where the district court denied this very same defendant's, Del Monte, motion for summary judgment against a longshoremen when it was demonstrated that *Del Monte purchased and provided* defective slings, which created dangerous knots that caught on a pallet and allegedly injured the longshoreman-plaintiff. First, it was determined that the arguably defective equipment in the case – the cargo sling – was part of the vessel's usual gear and was regularly stored on board; hence, it was an appurtenance of the ship. *Id.* at *6. Second, it was uncontroverted that Del Monte's port manager, Ernie Casper, received complaints about the knots. *Id.* at *10. Even though the knot complaints had nothing to do with the cause of plaintiff's injury, under Third Circuit precedent, it was determined that the knots posed a foreseeable general hazard. *Id.* Thus, the type of foreseeablity that determines a duty of care is not dependent on the foreseeablity of a specific event. *Id.* (citing *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1369 (3d

Cir. 1993). As a result, the *Mullen* court denied Del Monte's motion for summary judgment.

Therefore, two determinations must be made. First, is the hazard complained of – the manner by which two longshore gangs discharge cargo off a freighter – one that creates a general hazard. And second, was this general hazard foreseeable for any resulting harm, including but not limited to, a longshoreman being hit by a container being unloaded. Plaintiff argues that this case mirrors *Mullen,* and therefore, Del Monte's motion should likewise be denied, *Mullen,* however, is not controlling; nevertheless, the facts of *Mullen* are distinguishable from the facts at issue here.

The evidence indicates that Del Monte neither knew or had reason to foresee that performance of a stevedore using two cranes might endanger a longshoreman. Uncontroverted evidence showed that DRS, and previous stevedoring companies, had performed discharge operations in this manner without problems. The listing of the ship and the movement of the cranes were controlled by DRS employees, who used internally developed communication to control the marrying of the cranes. It was not the use of two cranes that created an unsafe condition, but rather, the parties' submissions indicate it was how the cranes were operated or synchronized that created a more dangerous condition. Because the cranes were not synchronized, a list was created, which arguably contributed to Goldsmith's accident.

Presently, it is not necessary for the Court to question the validity of this causal theory; even assuming there is a causal nexus, the critical issue is which party created the alleged hazard. Del Monte played no role on how the

cranes were operated, or in establishing the standard operating procedures that were used by DRS to marry up the cranes. Therefore, the mere presence of Del Monte employees at the terminal at the time of the stevedoring operation did not constitute knowledge of any unsafe condition. *See Daigle,* 616 F.2d at 828 (towboat master's ability to see actions of plaintiff did not establish a duty to warn plaintiff). Simply stated, Del Monte had no duty to warn Goldsmith of conditions of which it had no reason to know were dangerous.

The Court does not decide here whether there are circumstances in which a terminal operator might owe a duty of care to parties other than the stevedore. Clearly, if the terminal operator created the hazard and was put on notice of the hazard, as in *Mullen,* it arguably could be determined, at the summary judgment stage, that the terminal operator owed a duty to the longshoreman. Such is not the case here. If a terminal operator is not informed of any dangerous conditions regarding the stevedoring operation, and if the contract does not expressly require supervision and approval of the stevedoring operation, then the terminal operator's duty of ordinary care to the longshoreman is not breached by a "potentially unsafe" condition. Therefore, there is no genuine issue as to any material fact regarding Goldsmith's negligence claim against Del Monte. As such, Del Monte is entitled to judgment as a matter of law on all claims.

5. Liability under the Time Charter

Plaintiff relies upon the same arguments that were raised against Swan Reefer in an attempt to find a contractual duty of care against Del Monte. For the reasons

discussed in Part III.A.6, *infra*, the Court finds that in viewing the facts in a light most favorable to Goldsmith, Del Monte will be entitled to judgment as a matter of law as to liability claims arising from the Time Charter.

IV. Conclusion

Congress enacted the LHWCA to compensate injured longshoremen and limit the liability of stevedores, ship owners, and agents. In the instant suit, Plaintiff has attempted to evade the limitations of the LHWCA by bringing multiple causes of action against Swan Reefer based solely upon assertions, allegations and speculation. Similarly, Plaintiff has failed to demonstrate any genuine issues of material facts as a to a maritime negligence claim against Del Monte. Even when construing the record in the light most favorable to Plaintiff, the only Defendant whose actions could possibly be deemed negligent is Plaintiff's employer, DRS, against whom suit is prohibited; the remainder of the action is without factual basis. Accordingly, Defendants' Swan Reefer and Del Monte NA individual motions for summary judgment are granted.

An appropriate Order follows.

/S/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
United States District Judge

Dated: March 3, 2005